EDITOR'S NOTE

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IN THE SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1995

FILE COPY

No. 95-8836 (A-890)

In re ELLIS WAYNE FELKER

PETITION FOR WRIT OF HABEAS CORPUS, FOR APPELLATE OR CERTIORARI REVIEW OF THE DECISION OF THE UNITED STATES CIRCUIT COURT FOR THE ELEVENTH CIRCUIT, AND FOR STAY OF EXECUTION

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QUESTIONS PRESENTED

Petitioner, a death-sentenced inmate in the custody of Respondent, presents the following questions:

1. Did the State of Georgia obtain Petitioner's conviction and death sentence in violation of his federal constitutional rights?

2. Does the one week old Antiterrorism and Effective Death Penalty Act of 1996 ("The Act"):

a. unconstitutionally tie the hands of the federal courts with respect to the exercise of jurisdiction in habeas corpus actions, violating the requirement of separation of powers and encroaching on Article III powers of federal judges?

b. violate the Petitioner's Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendment rights, and the Supremacy Clause, in that it allows state courts to decide federal constitutional issues in a manner that is inconsistent with federal law, with impunity?

c. introduce uncorrectable arbitrariness into the federal habeas corpus process, in violation of the federal constitution?

2. What is a prima facie showing within the context of Sec. 106(b)(3)(C) of the Act?

3. What constitutes "previously unavailable" within the context of Sec. 106(b)(2)(A) of the Act?

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The Petitioner, Ellis Wayne Felker, respectfully requests that this Court enter a stay of execution so as to consider and grant Petitioner's petition for a writ of habeas corpus and to conduct appellate review of the lower court's actions.

OPINIONS BELOW

The opinion of the Court of Appeals for the Eleventh Circuit is not reported. A copy of the opinion is attached hereto.

JURISDICTION

This Court's jurisdiction is invoked pursuant to 28 U.S.C. Section 2241 and 2254(a), and 28 U.S.C. Section 1651(a).

STATEMENT OF REASONS FOR NOT MAKING APPLICATION TO THE DISTRICT COURT

As required by Rule 20 (4), Petitioner states that he has not applied to the district court because the circuit court prohibited such an application. The Petitioner exhausted his state court remedies when the Georgia Supreme Court denied relief on May 2, 1996. Petitioner has complied with 28 U.S.C. §

2254(b), as now amended by the Act, to the extent he has had notice of those requirements and to the extent they are capable of being met. Exceptional circumstances warrant the exercise of this Court's jurisdiction and adequate relief cannot be obtained in any other form or from any other court.

STATEMENT OF THE CASE

A. Statement of the Facts

1. On February 5, 1983, Petitioner was convicted of the murder of Evelyn Joy Ludlum. The primary controversy at trial was when the victim died. The day after the victim's disappearance, police placed Petitioner under constant surveillance, meaning he thereafter had the best alibi known.

2. The victim's body was discovered on December 8, 1981, thirteen days after her disappearance. A state crime lab employee who was not a physician conducted an autopsy. Georgia is the only jurisdiction in the Western World that allows a non-physician to conduct an autopsy. This state agent told his colleagues that the victim had been dead for three days when found. When this made Petitioner innocent--he had a state provided alibi for more than a week before this time of death--this agent changed his opinion.

3. The agent was allowed to testify at trial that the time of death could have been two weeks before the body was found, making Petitioner potentially guilty. A medical doctor testified on behalf of Petitioner that the agent's original opinion was

correct--the victim had been dead three to five days when found--making Petitioner innocent.

4. Thus, the jury was left to determine whether the state, through its non-physician state agent, had proven guilt beyond a reasonable doubt. The jurors' task was made unconstitutionally easy by a jury instruction and voir dire statements which equated the absence of reasonable doubt with the presence of moral certainty of guilt. The jury convicted Petitioner and sentenced him to death. This Court has recognized that such instructions violate bedrock constitutional principles.

5. Petitioner sought in the circuit court the retroactive correction of this error. He also challenged the constitutionality of the Act as written and as applied, raised the claim that he was innocent and that his execution would be unconstitutional, and raised the claim that the manner in which he was tried and convicted, i.e., state agent, non-physician, testimony regarding autopsy findings and time of death, violated the constitution. Relief was denied.

B. Procedural History

1. The name and location of the court which entered the judgment of conviction and sentence under attack are:

Superior Court of Houston County
Perry, Georgia

2. The date of the judgment of conviction was February 5, 1983.

3. The date of the judgment of sentence was February 7, 1983. The sentence was that Petitioner be put to death by electrocution for the crime of murder.

4. The nature of the offenses involved is that Petitioner was convicted of murder, in violation of O.C.G.A. § 16-5-1, rape, in violation of O.C.G.A. § 16-6-1, aggravated sodomy, in violation of O.C.G.A. § 16-6-2, and false imprisonment, in violation of O.C.G.A. § 16-5-41.

5. At his trial, Petitioner pled not guilty.

6. The trial on the issue of guilt or innocence and on the issue of sentence was had before a jury.

7. Petitioner testified at the trial on the issue of guilt or innocence. He did not testify at the sentencing trial.

8. Petitioner appealed his conviction and sentence of death.

9. The facts of Petitioner's appeal are as follows:

(a) The Supreme Court of Georgia affirmed Petitioner's conviction and sentence of death on March 15, 1984. Felker v. State, 252 Ga. 351, 314 S.E.2d 621 (1984). A timely filed Motion for Reconsideration was denied on March 29, 1984.

(b) Petitioner thereafter filed a Petition for Writ of Certiorari in the United States Supreme Court. The United States Supreme Court denied the Petition for Writ of Certiorari on October 1, 1984. Felker v. Georgia, 469 U.S. 873, 105 S.Ct. 229 (1984). Rehearing was denied November 26, 1984.

(c) Petitioner filed a Petition for Writ of Habeas Corpus in the Superior Court of Butts County on December 17, 1984. The Petition was denied August 6, 1990. A timely filed Certificate of Probable Cause to Appeal was denied by the Georgia Supreme Court on September 3, 1991.

(d) Petitioner filed a Petition for Writ of Certiorari in the United States Supreme Court, which was denied on January 21, 1992. Felker v. Zant, 502 U.S. 1064, 112 S.Ct. 950 (1992).

10. A federal petition for habeas corpus relief was filed in the district court on April 28, 1993. The district court would not allow Petitioner to proceed in forma pauperis. On June 2, 1993, a filing fee was paid and the district court moved the petition from the miscellaneous docket to the civil docket. On January 26, 1994, the Court denied relief.

11. On May 8, 1995, the United States Court of Appeals for the Eleventh Circuit affirmed the denial of relief by the District Court. Felker v. Thomas, 52 F.3d 907 (1995). Petitioner's timely filed Petition for Rehearing and Suggestion for Rehearing En Banc was denied on August 9, 1995. Felker v. Thomas, 62 F.3d 342 (1995).

12. Petitioner filed a Petition for Writ of Certiorari in the United States Supreme Court. The Petition was denied on February 20, 1996. Felker v. Thomas, __ U.S. ___ 116 S.Ct. 956 (1996). A Motion for Reconsideration in the United States Supreme Court was denied April 15, 1996.

13. On April 30, 1996, Petitioner filed a petition for writ of habeas corpus in the Superior Court of Butts County, Georgia.

REASONS FOR GRANTING THE WRIT

I.

THE ANTITERROISM AND EFFECTIVE DEATH PENALTY ACT OF 1996 ("THE ACT") IS UNCONSTITUTIONAL AS WRITTEN AND APPLIED TO PETITIONER, AND ITS CONSTITUTIONALITY IS AN ISSUE WHICH THIS COURT, RATHER THAN THE LOWER COURT, OUGHT TO RESOLVE.

The Applicant is a death-sentenced inmate in the custody of Respondent. His execution is scheduled for May 2, 1996, at 7:00 p.m. The Applicant has filed a previous federal habeas corpus action, but relief was denied.

The Act contains provisions for the initial screening and then final disposition of potentially second or subsequent habeas corpus petitions. Section 106 of the Act requires a Petitioner to seek the permission of a three judge panel of the circuit court to file a second or subsequent habeas corpus petition in the district court. See Sec. 106(b)(3)(A), (B) and (C). The motion seeking leave to file the petition shall be granted if "the application makes a prima facie showing that the application satisfies the requirements of this section [Sec. 106]." See Sec. 106(b)(3)(C).

Petitioner sought leave to file in the district court a petition which, as permitted by § 106, contained a claim which "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable." Sec. 106(b)(2)(A). The circuit court

denied permission for the filing of a petition. This action by the lower court was erroneous under the Act. See Argument II, infra.

As a threshold matter, however, this Act raises myriad constitutional concerns and is seriously constitutionally flawed. The Act's attempted removal of circuit rehearing, en banc rehearing, and certiorari review of claims of state violations of federal constitutional rights is unprecedented, dangerous, and invites anarchy in the processing of claims.[1] The Act's order that federal courts must hear certain claims and must rule on them in certain ways more than blurs the distinction between the legislative and judicial branches of the federal government. The Act's requirement that federal courts bow to state courts' incorrect applications of federal constitutional law impacts the Supremacy Clause, and other federal constitutional provisions--total control of the application of the federal constitution to the states is handed over to the states, the very entities that, in this context, are to be controlled by federal courts via the Great Writ. Thus, the Act violates the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments, the Supremacy Clause, and Article III, in that it allows state courts to decide federal constitutional issues in a manner that is inconsistent with federal law, with impunity.

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1. The circuit-wide, and intra-circuit, decisions on whether someone is innocent enough to not be executed, for example, will be ad hoc. The Act thereby introduces ostensibly uncorrectable arbitrariness into the federal habeas corpus process, in violation of the federal constitution.

These infirmities arise in at least the following ways:[2]

a. The Act prohibits the filing of a petition for rehearing and a petition for certiorari if a panel determines that a second or subsequent petition cannot be filed. Thus, what a three judge panel holds in denying permission to file a second or subsequent petition can be completely inconsistent with what another panel holds under identical circumstances and with what other circuit courts hold. Inter- and intra-circuit inconsistency in the enforcement of federal constitutional rights is its own constitutional violation, and the statute is unconstitutional on its face. Under such circumstances, the death penalty will strike like lightning--there is no provision for, much less guarantee of, uniformity in the handling of similarly situated Applicants.

b. The standard for determining whether an Applicant is permitted to file a second or subsequent petition is too vague to protect Applicants from State court violations of federal constitutional rights. Whether a Petitioner receives federal review of a constitutional challenge in a second petition setting will depend upon whether he or she makes a "prima facie" showing of a violation of a retroactively applied constitutional right. "Prima facie" showing is not defined by the Act.

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2. Undersigned counsel have been unable fully to digest the provisions, much less to research, brief, and plead all of the ramifications, of the Act. It appears that Applicant is the first person in the country to whom the Act will be applied.

c. The Act allows the filing of a second petition with respect to a "previously unavailable" claim, but does not define what previously unavailable means.

d. The Act requires federal courts to defer to wrong state court applications of federal constitutional law.

e. The Act allows the execution of a person who is in fact innocent but who had a constitutional trial;[3] and

f. The Act does not allow a federal court to announce and apply in the Applicant's case a federal constitutional violation of the most bedrock sort which infected the truth-seeking process.[4]

g. The Article III power of federal judges cannot be constrained by Congress. Congress cannot require federal judges both to entertain, and to rule a specific way regarding, civil actions. Under the Act, Congress requires federal courts to entertain, but to rule in certain ways regarding, habeas corpus actions. This violates the doctrine of separation of powers, and is unconstitutional.[5]

The application of this statute to Applicant violated these and other constitutional guarantees. The issues deserve more considered treatment than is allowed by the existence of a one

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3. See Section III, infra.

4. See Section III, infra.

5. The Act does not amend 28 U.S.C. Sections 2241 or 2254 (a), which confer jurisdiction on the federal courts to entertain petitions for writs of habeas corpus. Federal courts still have jurisdiction; Congress has acted only to direct results.

week old statute. Under these circumstances, and under the prevailing case law, Petitioner is entitled to stay of execution. See Barefoot v. Estelle, 463 U.S. 880 (1983).

II.

THE LOWER COURT'S FIRST IMPRESSION OF THE ACT WAS INCORRECT AND DECIDED ISSUES WHICH HAVE NOT BEEN BUT WHICH OUGHT TO BE DECIDED BY THIS COURT, INCLUDING A.) WHAT IS A PRIMA FACIE SHOWING?, AND B.) WHAT DOES IT MEAN FOR A CLAIM TO HAVE BEEN PREVIOUSLY AVAILABLE?

Petitioner contends that he made a prima facie showing that his claim under Cage v. Louisiana, 498 U.S. 39 (1990), satisfies the requirements of Sec. 106(b)(2)(A), and that he was entitled to a stay of execution and permission to file his habeas corpus petition in the district court. A prima facie showing is a showing which on its face may entitle a petitioner to relief. Petitioner is entitled to district court consideration of his claim upon a prima facie showing that a) his claim is one which has been applied retroactively[6] and b) it was not previously available to him. Petitioner pled that Cage error occurred, that Cage is retroactive, and that at the time he filed his first petition the retroactive application of Cage was not available.

In denying permission to file a petition, the circuit court assessed both the Petitioner's showing and the Respondent's response, which is the antithesis of a prima facie assessment. Prima facie is "on its face" without any showing from the Respondent. Further, the circuit court assessed the merits of the claim, which it had no jurisdiction to do, under the Act. If

6. Respondent concedes the retroactivity issue.

a prima facie showing is made, the district court decides the merits.[7]

Plainly Petitioner made a prima facie showing. The Due Process Clause of the Fourteenth Amendment "protects the accused against conviction except upon proof beyond a reasonable doubt of every fact necessary to constitute the crime with which he is charged." In re Winship, 397 U.S. 358, 364 (1970); see also Jackson v. Virginia, 443 U.S. 307, 315-16 (1979). This Court has consistently recognized that the reasonable doubt standard is a bedrock element of due process and "plays a vital role in the American scheme of criminal procedure." Winship, 397 U.S. at 364. The Court has also emphasized that, "[i]n the administration of justice, courts must carefully guard against dilution of the principle that guilt is to be established by probative evidence and beyond a reasonable doubt." Estelle v. Williams, 425 U.S. 501, 503 (1976).

As this Court has explained, the concept of reasonable doubt means that the trier of fact must be convinced of the defendant's guilt "with utmost certainty." In re Winship, 397 U.S. 358, 364 (1970). Similarly, the Court has held that to convict, jurors must reach "a state of near certitude." Jackson v. Virginia, 443 U.S. 307, 315 (1979); see also Lanigan v. Maloney, 853 F.2d 40, 47 (1st Cir. 1988) (concept of proof beyond a reasonable doubt must "convey the critical point that, while absolute certainty is

7. Sec. 106 (b)(3)(A), (B) and (C); see also Nutter v. White, 39 F.3d 1154, 1158 (11th Cir. 1994).

unnecessary, a belief in guilt at least approaching absolute certainty was required") (emphasis in original). The "utmost certainty" referred to in Winship refers to the highest level of certainty attainable in the domain of human affairs, involving factual questions depending on empirical evidence, i.e., the level of certainty a notch shy of the absolute certainty available only in the domains of physics or mathematics.

Petitioner has maintained his innocence of the crime in this case, he waived his right to silence and testified to his innocence, and he continues to state, unequivocally, that he is innocent. Objectively, there is a very real and substantial probability that he is innocent and that his conviction resulted from an antiquated autopsy and crime scene investigation system in Georgia, see sub-section A, infra, and an unconstitutional, and equally antiquated, jury instruction and voir dire which equated the absence of reasonable doubt with "moral certainty" and allowed the jurors to accept the state's theory without "utmost certainty" of guilt. See sub-section C, infra; Cage v. Louisiana, 498 U.S. 39 (1990). This Court (and the lower court) has held that such jury instructions constitute structural (and to be retroactively corrected) constitutional error. Sullivan v. Louisiana, 113 S. Ct. 2078 (1993); Nutter v. White, 39 F.3d 1154 (11th Cir. 1994). See sub-section B, infra. Because of this violation, and because this claim was not previously available to Petitioner, see sub-section C, infra, the Petitioner should have

been allowed to file a habeas corpus petition in the district court.

A. Cage Error Cannot be Harmless, But There Was Manifest Harm in this Case--Petitioner is Innocent

"Time of death was a critical issue at trial."[8] It was critical because if death occurred after November 25, 1981, Petitioner was innocent. "His alibi [thereafter] was a good one--the police had him under surveillance ...." Felker v. Thomas, 52 F.3d 907, 909-910 (11th Cir. 1995). If the victim was killed after November 25, 1981, someone else killed her.[9]

The victim's body was found on December 8, 1981. If she had been dead less than thirteen days, then Petitioner did not kill her.

An autopsy was performed by Warren Tillman. He was an agent with the Georgia state crime lab. He was not a medical doctor. He told his colleagues--law enforcement authorities--that the victim had been dead for three days, or from eight to ten days

8. Brief on behalf of the Appellee By the Attorney General, filed in the Georgia Supreme Court on direct appeal, at p. 112.

9. While there was other circumstantial evidence of Petitioner's guilt, he would not have been convicted if the time of death was after the police surveillance began.

after Petitioner was placed under surveillance.[10] This meant that Petitioner was innocent.

After further discussions with his associates, "Tillman advised investigators that the victim could have been dead for two weeks prior to the discovery of her body, [and] a search warrant was issued for the search of appellant's automobile." Pelker v. State, 314 S.E.2d at 639.[11]

Thus, Tillman told his associates that the victim had been dead for three days, which made Petitioner innocent. Tillman later told his associates the victim could have been dead long enough for Petitioner to have killed her.

Worse, Tillman was allowed to tell the jurors--as an expert--that the time of death could have been up to two weeks before the victim's body was discovered. Tillman's testimony was the sole evidence that the murder occurred at a time when Petitioner

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10. Sworn statements submitted for the purpose of obtaining search warrants on December 9, 1981, recited that "the affiant has learned from medical examination, that she died approximately three (3) days prior to her discovery." See Exhibits 1 and 2, December 21-22, 1982, hearings. The affiant testified pre-trial that Tillman "stated [after the autopsy] that he felt like she had been dead about three days." Id. at 24; see also id. ("Based on what Mr. Tillman had told us about the possibility of her being dead three days prior to her being discovered ....").

11. This search warrant was obtained on December 23, 1981, but it, unlike the December 9, 1981, warrants, contained no time of death. Nevertheless, officer Sullivan testified that the December 23, 1981, warrant was obtained because "we had heard from Dr. Tillman that, through a little bit further investigation, that it was possible that she had been dead in the, or had been dead from the time she had come up missing or possibly for two weeks." December 21-22, 1982, hearings, p. 29. Again, Tillman was not a medical doctor.

could have been guilty, i.e., before Petitioner's police supported alibi.[12]

No physician who has reviewed the evidence in this case agrees with Tillman. Indeed, one of the world's leading experts on cause and time of death, Dr. Werner Spitz, a physician whose authoritative text was referred to throughout trial,[13] has concluded that the time of death was long after Petitioner was placed under police surveillance. See Appendix 3.[14]

Having non-physicians conduct autopsies and testify with respect to cause and time of death has caused great controversy in Georgia and has led to reform. See Appendix 5.[15] Even more

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12. Furthermore, the only forensic evidence that the victim was bound and hence tortured came from Tillman's testimony. Petitioner's physicians disagree with this testimony and from the evidence cannot say that the victim was raped or sodomized. See Appendix 4.

13. Dr. Werner Spitz is the editor of the principal textbook of forensic pathology, Medicolegal Investigation of Death, third edition, Charles C. Thomas, publisher, Springfield, Illinois, 1993. An earlier edition of this text was referred to by counsel at trial repeatedly. See, e.g., R. 361, 383-86, 392-93, 404, 410-11, 450-53, 1003-04.

14. Jonathan Arden, M.D., an expert medical examiner, agrees that the death occurred after Petitioner had an alibi, and disagrees with Tillman's testimony that the victim was raped, bound, and tortured. Appendix 4.

15. See Appendix 5: "Getting Away With Murder," The Atlanta Constitution, June 4, 1989 ("'Georgia is the only state in the country and the only jurisdiction in the western world that allows non-physicians to do autopsies.'"); "Critics advocate death of Georgia Coroner System." The Atlanta Constitution, August 15, 1988, A1 ("'The coroner system in this state should have gone out with the horse and buggy.'"); "Experts Urge lawmakers to Revamp Coroner's System," The Atlanta Constitution, September 14, 1989, C1 ("Besides an autopsy, death scene investigations--and standards for conducting them--need to be adopted in Georgia, the experts told legislators ....").

controversial is the policy of allowing non-physicians from the state crime lab to conduct autopsies and testify for the state in criminal prosecutions,[16] as occurred in Petitioner's case.

The peril of having non-physician, state advocates testify to critical issues with respect to time and manner of death is most acute in a capital context where the tolerated margin of error with respect to fact-findings is lowest. The peril in Petitioner's case turned into actual harm--Tillman was wrong, the jury relied upon him,[17] and no other person in the country would be sentenced to death on the basis of such testimony.

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16. The freedom of forensic pathologists to present their findings in court -- whether in favor of the defense or the prosecution -- is at the heart of the debate over a bill that would change Georgia's system of death investigation.... Georgia remains the only state in the nation that allows non-physicians to perform autopsies.... National model standards for medical examiners indicate that, ideally, those who perform autopsies should be free from any political pressure.

App. 5, "Question of control dominates bill to upgrade coroners system," The Atlanta Constitution, September 12, 1990, E3. Problems of non-independence and bias arise when the witness about cause and time of death is a Georgia Bureau of Investigation employee. Id.

17. At trial, Petitioner presented medical testimony that the time of death made it impossible for him to be guilty. The jury verdict credited Tillman.

B. Unconstitutional Jury Instructions Allowed the Jury to Convict Without "Utmost Certainty," In re Winship, 397 U.S. 358, 364 (1970), of the Time of Death

To constitutionally convict, the jury had to be convinced to the utmost certainty and to a "near certitude" that the victim was killed before Petitioner was placed under surveillance. The jury instructions, and the jurors' voir dire pledges to follow them, allowed conviction based upon less than utmost certainty.

The jurors were instructed as follows:

> In a criminal case ... the State must prove each of its contentions beyond a reasonable doubt and to moral certainty.
>
> ....
>
> **The state, however, is not required to prove his guilt beyond all doubt. Moral and reasonable certainty is all that can be expected in a legal investigation.**
>
> A reasonable doubt is defined as a doubt which is based on the evidence, a lack of evidence or a conflict in the evidence. It is doubt that is reasonably entertained as opposed to a vague or fanciful or farfetched doubt.

R. 1102-03.

The jurors who served were directly asked during voir dire if they would apply the standard of reasonable doubt embodied in the single phrase: "Moral and reasonable certainty is all that can be expected in a legal investigation." The jurors agreed to do so.[18]

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18. Ten of the jurors selected to determine Petitioner's guilt were, during voir dire, expressly told, and they agreed to apply, the precise definition of proof beyond a reasonable doubt set out in bold above. See R. 215, 1610 (juror Miller); R. 265, 1611 (Mayo); R. 313-14, 1612 (Sirmon); R. 393, 1612-13 (May); R. 586-87, 1614 (Brady); R. 629, 1614 (Griffin); R. 792, 1616 (Daffron); R. 973, 1618 (Boltz); R. 1023, 1619 (Crane); R.

(continued...)

Equating proof beyond a reasonable doubt with proof "to a moral certainty" is unconstitutional because moral certainty can be established with less proof than can proof beyond a reasonable doubt. The trial court in Petitioner's case equated moral certainty with the absence of reasonable doubt. In Cage v. Louisiana, 498 U.S. 39 (1990), this Court found instructions very similar to those given in Petitioner's case to be constitutionally invalid. The Court held that the Louisiana state trial court had violated the due process principles established In re Winship, 397 U.S. 358 (1970), when it defined reasonable doubt as "such doubt as would give rise to a grave uncertainty," "an actual substantial doubt," and requiring "not an absolute or mathematical certainty, but a moral certainty." Cage, 498 U.S. at 40 (quoting State v. Cage, 554 So.2d 39, 41 (La. 1989)). The Cage Court noted that its previous decisions had repeatedly emphasized the constitutional underpinnings of the beyond-a-reasonable-doubt standard in criminal trials.

The reasonable doubt instruction condemned by the Court in Cage is in all material respects identical to the charge given in Petitioner's case. The voir dire and the jury instructions clearly expressed the notion, condemned by the Supreme Court in Cage, that the beyond-a-reasonable-doubt standard is "synonymous"

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18. (...continued)
1069, 1619 (Johnson). The other two jurors agreed that they would convict if they were "satisfied in [their] heart and conscience of the defendant's guilt." R. 25, 1609 (Hill); R. 189-90, 1610 (Yawn). Juror Yawn agreed not to "require[the state] to prove his guilt beyond all doubt, just to a reasonable and moral certainty." R. 190 (emphasis added).

with "proof to a moral certainty," that any doubt must be more weighty than "vague," and that moral certainty is "all that can be expected" or required.[19] Given the supposed circumstances of this case--abduction, rape, sodomy, torture and a history of sexual deviancy--juror morals could easily, but unconstitutionally, have entered into the reasonable doubt equation.[20]

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19. The phrase "moral certainty" in contemporary parlance means a level of certainty distinctly below that required by proof beyond a reasonable doubt. See Victor v. Nebraska, 114 S.Ct 1239, 1247 (1994). To the extent that "moral certainty" is currently understood as denoting only the probability or even a strong probability of a fact, it is inconsistent with the requirement of "utmost certainty" enunciated in Winship, and instead conveys a meaning far more consistent with the legal concept of "preponderance of the evidence," or at most "clear and convincing evidence."

20. Besides diluting the state's burden of proof, the inclusion of "moral certainty" in a reasonable doubt instruction invites the jury to base their decision on feelings rather than facts, on emotion rather than on evidence. See Perez v. Irwin, 963 F.2d 499 (2d Cir. 1992) ("the concern is that the use of the words [moral certainty] might lead a jury to reach a verdict based on feelings rather than on the facts of the case"). This occurs because the phrase "moral certainty" has acquired an additional meaning, apart from the mere "probability" definition noted above. A cluster of current dictionary definitions define "moral certainty" as a strong personal belief in a particular fact or idea in the absence of or regardless of objective evidence. For example, Webster's Third New International Dictionary - Unabridged (1986) defines "moral certainty" as "based on an inner conviction"; and "virtual rather than actual, immediate, or completely demonstrable." Id. at 1468, col. 3; see also The American Heritage Dictionary of the English Language 1173, col. 2 (3d ed. 1993) (defining moral certainty as "[b]ased on a firm conviction, rather than upon the actual evidence: A moral certainty") (emphasis added); Webster's II New Riverside Dictionary 769, col. 1 (1984, 1988) (moral certainty defined as "[b]ased on strong likelihood of conviction rather than on solid evidence").

(continued...)

C. Cage is to Be Retroactively Applied

The Cage holding is, ineluctably, retroactive. The State agrees. In Sullivan v. Louisiana, 113 S. Ct. 2078 (1993), the Court, applying Cage, noted that reasonable doubt instructional error is a "'structural defect[] in the constitution of the trial mechanism'" because the jury guarantee that it violates is a "'basic protectio[n]' whose precise effects are immeasurable, but without which a criminal trial cannot reliably serve its function." Id. at 2082-83 (quoting Arizona v. Fulminante, 499 U.S. 279, 310 (1991)). The Sullivan Court concluded:

> The right to jury trial reflects, as we have said, "a profound judgment about the way in which law should be enforced and justice administered." Duncan v. Louisiana, 391 U.S. [145], 155. The deprivation of that right, with consequences that are necessarily unquantifiable and indeterminate, unquestionably qualifies as "structural error."

113 S.Ct. at 2082.

Petitioner has challenged the constitutionality of the jury instructions given at the guilt or innocence phase of his trial, relying on the Court's unanimous per curiam opinion in Cage.

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20. (...continued)
In light of this additional meaning of the phrase "moral certainty," the damaging potential of the defective reasonable doubt instruction in Petitioner's case is apparent. The jury was exposed to many shocking and lewd details, many of which we now know to be untrue. Beyond this, the prosecutor's closing argument incited the jury to supplant an objective evaluation of the facts with their own emotional reactions to what they had heard. Because the trial judge equated reasonable doubt and moral certainty, Petitioner was thus deprived of his right to have a jury impartially determine whether the state had met its burden beyond a reasonable doubt.

Because Petitioner's direct appeal was final before the Court announced Cage, however, a federal habeas court may entertain the claim only if the Cage holding does not constitute a "new rule" or if the holding "alter(s) our understanding of the bedrock procedural elements essential to the fairness of a proceeding." Sawyer v. Smith, 497 U.S. 227, 242 (1990); see also Teague v. Lane, 489 U.S. 288 (1989); the Act, Sec. 106(b)(2)(A). Clearly (1) Cage did not announce a "new rule" of criminal procedure, or (2) if new, the rule in Cage falls within the "fundamental fairness" exception to the nonretroactivity principle of Teague v. Lane, 489 U.S. 288 (1989).

D. This Claim Was Not Previously Available

Cage was decided after Petitioner was denied relief in the state habeas corpus court in 1990. Petitioner filed a federal petition on April 28, 1993, and it was placed on the district court's civil docket on June 2, 1993. Sullivan was decided June 1, 1993. Petitioner thus made a prima facie showing that the retroactive application of Cage to Applicant's case was not available before the filing of this application.

III.

PETITIONER IS ENTITLED TO HABEAS CORPUS RELIEF ON HIS CLAIM THAT THE PROCESS THROUGH WHICH HE WAS CONVICTED WAS UNCONSTITUTIONAL AND THAT HIS EXECUTION WOULD VIOLATE THE EIGHTH ND FOURTEENTH AMENDMENTS

Under the Act, a claim that a person is innocent and that their execution would violate the Eighth and Fourteenth Amendments, see Herrera v. Collins, 113 S. Ct. 853 (1993), cannot

be heard at all. A claim that a person's constitutional rights were violated at trial in a manner that will constitute a newly announced, yet bedrock and retroactive, rule (the second Teague exception) cannot be heard. Petitioner presents both of these habeas corpus claims here, because there is no other forum.

A. Petitioner is Innocent of Murder

Petitioner presented testimony at trial from an expert physician that the time of death was three to five days before the victim's body was discovered, making it impossible for Petitioner to be guilty. The State attacked this physician because he had been paid to testify, and because he had supposedly made a mistake in the past. The jury obviously chose to believe the State's non-physician, agent, and revised, "expert" opinion.

Tillman's opinion ought not to provide the sole basis for executing Petitioner. Tillman's opinion is not reliable. Petitioner has presented all of the forensic evidence regarding the victim to two highly qualified physicians, both of whom disagree with Tillman's revised "opinion" regarding time of death.

a. Dr. Spitz

Dr. Spitz is the nationally recognized expert on forensic pathology. He has reviewed the materials relevant to a determination of time of death and has concluded that death occurred when Petitioner could not have been responsible:

I am a licensed physician, specializing in forensic pathology. I received an M.D. degree from The

Hebrew University, Hadassah Medical School, in Jerusalem, Israel, in 1953. I completed an internship and residency in forensic pathology at Hadassah Medical School from 1953-1959, and I was a research fellow in forensic pathology at the University of Maryland from 1959-1961. I have held numerous faculty, hospital, and other professional appointments in forensic pathology. I have been certified by the American Board of Pathology in Forensic Pathology and Anatomical Pathology, and I am a member of a number of professional societies in medicine and the forensic sciences. I am the editor of the principal textbook of forensic pathology, **Medicolegal Investigation of Death**, third edition, Charles C. Thomas, publisher, Springfield, Illinois, 1993. The copy of my curriculum vita which is attached as Appendix A details my professional experience and background.

At the request of counsel for Mr. Ellis Wayne Felker, I have reviewed background materials relevant to the death of Joy Ludlum. These include the report of the autopsy of Joy Ludlum, the testimony of Warren Tillman, prosector, the testimony of Dr. James Whitaker, pathologist, the testimony of Dr. Joseph Burton, defense pathologist, Dr. Larry Howard, Crime Lab Director, and Steven Hartman, geologist, photographs of the scene where the body was discovered and photographs of the autopsy, and local climatological data provided by the U.S. Department of Commerce.

Based upon this information and my experience of forty-three years in the field of forensic pathology, it is my opinion to a reasonable degree of medical certainty that the death of Joy Ludlum was properly estimated by Warren Tillman, who performed her autopsy, as having occurred 3-5 days prior to the morning of December 8, 1981, when her fully dressed body was recovered in Scuffle Creek.

The minimal decomposition of the body, as described in the autopsy report and as evident in the photographs, in consideration of the prevailing climatic conditions and the temperature of the water in the creek at that time of year are consistent with this estimate.

I have testified as an expert witness in the field of forensic pathology in state and federal courts throughout the United States on many occasions. To my knowledge, Georgia is the only state in the country

which allows a non-physician to perform an autopsy and testify about the time of the victim's death.

Appendix 3 (emphasis added).

b. **Dr. Arden**

Dr. Arden, an expert medical examiner, agrees with Dr. Spitz:

I am currently the acting First Deputy Chief Medical Examiner for the City of New York and have held that position since 1991. I graduated from the University of Michigan Medical School in 1980 with an M.D. Following that, I completed a residency in anatomic pathology at New York University Medical Center, from 1980 to 1983. I participated in a forensic pathology fellowship at the Office of the Chief Medical Examiner, State of Maryland from 1983 to 1984. I was board certified by the American Board of Pathology, Anatomical and Forensic Pathology, in 1985 and am licensed to practice medicine in New York and Delaware. I have been a practicing medical examiner for twelve years, practicing exclusively as a forensic pathologist. I have testified as an expert witness in over 240 cases. In almost all of these cases, I was called as a witness by the state.

I was recently asked by an attorney for Wayne Felker to review files and records in the above captioned case. I reviewed the following files:

1. Autopsy Report on Joy Ludlum;
2. Testimony of Warren Tillman;
3. Testimony of Dr. James Whitaker;
4. Testimony of Dr. Larry Howard;
5. Testimony of Dr. Joseph Burton;
6. Testimony of Stephen Hartman;
7. Rebuttal testimony of Dr. James Whitaker;
8. Autopsy and crime scene photographs of the body.

I was asked by the attorney to review these files to determine the time of death of the victim. Based upon my review of these records, I conclude to a reasonable degree of medical and scientific certainly that the victim had been dead only three to five days at the time the body was discovered. This finding is consistent with the initial findings of Warren Tillman, the autopsist for the state. It is also consistent with the findings and trial testimony of Joe Burton, M.D.

The figure of three to five days is based upon my independent review of the above listed records and photographs and my extensive experience in the field of forensic pathology. A number of factors recorded in the autopsy report and photographs support this finding.

The photographs indicate that the body is in a very good state of preservation. The body is intact, not significantly marbled, with good features, no protrusion of the eyes, no darkened face, good texture of skin, and a general lack of other post-mortem changes. The photographs and autopsy report do not support a description of this body as decomposed. Initially I would note the absence in the autopsy report of any mention of rigor mortis. One of the critical observations that should be made both at the time the body is discovered and at the time of the autopsy is the degree of rigor mortis or lack of rigor mortis. Rigor mortis is one of the cardinal descriptors of the time of death, and the best time to get that information is from the scene. This is information that should always be recorded in an autopsy, yet the autopsy in Mr. Felker's case fails to mention anything about rigor mortis. The photographs of the body from the scene do indicate the presence of rigor mortis, both from the position of the arms and the legs and from the general position of the body. For example, State's Exhibit 10 shows legs bent slightly at the knees with the knees pointing upward and slightly out at an angle, clearly suggesting the presence of rigor mortis. If rigor were not present, the forces of gravity would cause the knees to spread apart and fall toward the ground, and/or the legs would straighten at the knees.

Under average conditions and with an average person, detectable rigor mortis is generally seen in a body within two to three hours, and after five to six hours there is strong evidence of rigor that is noticeable in most parts of the body and takes pressure to overcome. By twelve hours, rigor mortis generally reaches its maximum level. The period of time necessary for rigor to dissipate is roughly equal to the time of onset, if the body is not disturbed. In average conditions, the duration of rigor mortis would be between twenty-four to thirty-six hours, with a high estimate of forty-eight hours.

The victim was of average size. The submersion in cool water would slow down the onset and dissipation of rigor mortis. Testimony indicates that the average

temperature of the water was fifty to fifty-seven degrees, some fifteen to twenty degrees below the average temperature upon which the above calculations rely. The equation of one day in air equals two days in water that was in the testimony is a valid equation, and is relevant to both the process of rigor mortis as well as other post-mortem changes. The fact that this victim still showed signs of rigor mortis at the scene supports the finding that she was dead three to five days, and is patently inconsistent with a finding that she was dead fourteen days.

The photographs and records also do not indicate a great degree of skin slippage. The skin is slightly wrinkled, with some evidence of slippage, but a body that has been submerged in water for two weeks would show a much greater degree of skin slippage.

The autopsy report indicates that the body was in the earliest stages of decomposition. The condition of the victim's body is consistent with a body that had been in average temperature and conditions for one to two and one half days. For example, the report does not describe the organs as soft and pulpy, a condition that occurs as a body decomposes.

Additionally, there was no evidence of the purging of fluid from the nose and the mouth. This is a condition that occurs within a few days after death in a body that is not submerged. As noted above, it is accurate that a body that has been in water since death will be slightly better preserved than a body that is not submerged. Taking the fact of submersion of the body into account would provide a time of death of two to five days.

The green marbling described in the autopsy report is consistent with a body that had been dead for no longer than three to five days. The autopsy report describes marbling primarily around the anterior chest and abdomen. A body that had been dead for fourteen days would likely show much more extensive signs of marbling throughout the body. This extent of marbling was not indicated in either the autopsy report nor the photographs.

The autopsy was not conducted until twenty four hours after the body was removed from the water. After a body is removed from water, the decomposition process begins very quickly. Many of the signs reported by the autopsist to support his conclusion that the victim had

been dead for fourteen days may have been the result of the body's exposure to the air for twenty-four hours.

The condition of the body described in the autopsy report and depicted in the photos does not support a finding that the victim had been dead for many days and there is no medical or scientific basis for the finding that the victim had been dead for fourteen days prior to the discovery of the body. The lack of disturbance by aquatic life is noteworthy. Testimony indicates that turtles, fish and other aquatic life were present in the stream where the body was found. It is very common to have some evidence of animal activity on bodies that have been submerged, particularly in a body that had been submerged for two weeks.

The autopsy in this case was poorly done. Mr. Tillman had insufficient qualifications to be performing autopsies, particularly forensic autopsies. I was surprised to read that a person with no medical degree was performing autopsies in 1982, and that there were states where this was permissible. In my experience, I have never heard of non-physicians performing autopsies. To qualify as a pathologist, a person must first complete medical school. Then a three year minimum residency in pathology where all work is supervised and reviewed by a qualified pathologist is required. To become properly trained in forensic pathology, an additional one year residency in forensics is essential. In the majority of states, these requirements were the norm in 1982.

The first omission in the examination of this body was the failure of either the autopsist or anyone from his staff to attend the scene and make initial observations of the body. In fact, no observations concerning the condition of the body were made by anyone from the autopsist's staff until the autopsy was performed twenty-four hours after the body was discovered. It is routine and necessary in this field for either the medical examiner or a trained investigator to visit the scene where the body was discovered and to make preliminary observations about the condition of the body. These observations include the degree of rigor mortis in the body, any evidence of lividity, the texture of the skin, and other evidence of post mortem deterioration. If an investigator from the medical examiner's office attends the scene rather than the medical examiner, he or she should be both forensically and medically trained. The autopsist in Mr. Felker's case did not have sufficient

qualifications to be designated as pathologist investigator, much less as the primary autopsist.

Second, the autopsist failed to take sections of the victim's body that should have been taken. Sections of the genitalia would have assisted in the determination of whether the victim was raped or sodomized. These sections could have shown the extent of the alleged bruising, whether the bruising was internal and the age of the bruising. The pathologist's testimony about the dilatation being indicative of an object being inserted in the anus after death is mere conjecture and is not supported by any available scientific evidence. Additionally, the photographs show no evidence of injury or bruising to either the anus or the vagina, contrary to the testimony presented at trial.

The exhumation in this case provided no further information of value. The autopsist had failed to make the appropriate observations at the autopsy, so had insufficient evidence to support the time of death of fourteen days. After burial, the decision was made to exhume the body. The persons handling this procedure were unqualified to do so. When the body was exhumed, a local pathologist was brought in to observe, while a biochemist did the work. There is no indication that the pathologist participated in the autopsy other than by his mere presence. Records indicate that this was the only participation in the autopsy and related procedures by anyone with any medical experience. No samples were taken during the exhumation which would assist in determining the time of death, the existence of genital bruising, or the degree of injury prior to death, critical issues in the prosecution of Mr. Felker.

The photographs and records do not support the conclusion that there were circumferential contusions around the vagina and anus indicative of an object being entered into the orifices with force. There is no evidence of bruising to the vagina or anus. As noted in the autopsy report, swabs of the vagina and anus revealed no evidence of semen. Based upon all available scientific and medical evidence, it is my opinion to a reasonable degree of medical certainty that there is no evidence suggesting forced entry by a penis or foreign object in any orifice of the victim.

The conclusions concerning the bruising around the wrist and ankle area are supported neither by the photographs nor by the autopsy. Photographs of the

extremities show no evidence of binding. The photos show only one bruise on the left wrist and one bruise on the ankle. Both of these bruises are oval, non-descript bruises, more consistent with a blow to the body than with binding of the extremities. State's Exhibit 47, a photograph of the bruise on the wrist, shows no indication that this bruise extended around the wrist as would be expected if the wrist had been bound. The bruise has no pattern, no linearity, is not narrow, and runs up the wrist rather than across the wrist, all of which is contrary to what is generally seen with a bruise resulting from binding. There are no ligature marks, no marks of twine that has "cut into" the arm, no evidence of adhesive from tape on the wrist, and no other marks indicating binding. State's Exhibit 12, a photograph of the body at the scene, indicates that the bruise did not extend to the back of the wrist. With a ligature on the wrist, generally more pressure is exerted and more constriction is evidenced on the bone extending to the thumb. But photographs show no evidence of any bruising on this bone, nor is any bruising on this bone reported in the autopsy report. In summary, there is no feature that is specific or diagnostic to support the finding that the wrist was bound.

The bruise on the ankle is similar to the bruise on the wrist. Again, there is no evidence of any ligature nor any other factors which would suggest binding. State's Exhibit 48, a photograph of the bruise on the ankle, shows an oval bruise that does not extend around the ankle. This bruise is more consistent with a blow to the ankle, the ankle making contact with an object as a result of a kick, or the result of a struggle than with a ligature around the ankle. Again, there is no specific or diagnostic feature that would support a finding that this bruise on the ankle was a result of binding. Both the bruise on the ankle and the bruise on the wrist have been over-interpreted in the testimony, resulting in findings that are not supported by the scientific and medical evidence.

Conclusion

Based upon my review of the autopsy notes and all other files listed above, it is my unequivocal opinion that the victim in this case was not dead for fourteen days. It is my professional opinion to a reasonable degree of medical and scientific certainty and based upon all relevant evidence that the time of death of

this victim was three to five days prior to the discovery of the body.

Appendix 4 (emphasis added).

Under these circumstances, Petitioner is innocent of murder and his execution would violate the Eighth and Fourteenth Amendments. The state has no process for assessing this claim, and the circuit court would not hear it.

B. Having a State Agent, Non-Physician, Testify to the Critical Issue of Time of Death Violates Due Process and the Prohibition on Cruel and Unusual Punishment

Capital proceedings must be accompanied by all the accoutrements of due process "befit[ting] a decision affecting the life or death of a human being." Ford v. Wainwright, 477 U.S. 399, 411 (1986). It is axiomatic that procedures surrounding the judicial finding of facts which will result in a person living or dying must "aspire to a heightened standard of reliability." Id at 411; see also Eddings v. Oklahoma, 455 U.S. 104, 117-18 (1982) ("[T]his Court has gone to extraordinary measures to ensure that the prisoner sentenced to be executed is afforded process that will guarantee, as much as is humanly possible, that the sentence was not imposed out of whim, passion, prejudice, or mistake.") (O'Connor, J., concurring). "That need is greater still because the ultimate decision [in Petitioner's case] will turn on the finding of a single fact, not on a range of equitable considerations." Ford, 477 U.S. at 412,

The sole, determinative, issue in Petitioner's case was the time of the victim's death. The only evidence that the death

occurred when Petitioner could have caused it was the "expert" testimony of a non-physician employed by the prosecution arm of the State of Georgia. All physician testimony on the time of death makes the Petitioner innocent. The process employed by the State of Georgia for determining whether the Petitioner was guilty was seriously flawed, and the State has no legitimate interest in such a flawed process. Ake v. Oklahoma, 470 U.S. 68, 80 (1985)("[t]he State's interest in prevailing at trial . . . is necessarily tempered by its interest in the fair and accurate adjudication of criminal cases").

The process employed to determine that Petitioner was guilty and deserved the death penalty violated the Petitioner's right to due process of law and to be free from cruel and unusual punishment, guaranteed by both the United States and the Georgia Constitutions. The State of Georgia is the only jurisdiction in the western world which would allow a conviction based upon the testimony provided by the state's expert in this case. Plainly Georgia is out of step, is wrong, and is poised to execute a person whose guilt was unfairly and wrongly determined. See Herrera v. Collins, 113 S. Ct. 853 (1993)(majority of court accepts that it would violate the constitution to execute an innocent person); Griffin v. Delo, 33 F.3d 895, 908 (8th Cir. 1994)(Supreme Court in Herrera declared "that in a capital case a truly persuasive demonstration of 'actual innocence' made after trial would render the execution of a defendant unconstitutional,

and warrant federal habeas relief if there were no state avenue open to process such a claim.").

CONCLUSION

Petitioner respectfully requests that the Court enter an order staying his execution and granting the relief requested.

Respectfully submitted,

M. ELIZABETH WELLS
Georgia Bar No. 747852
STEPHEN C. BAYLISS
Georgia Bar No. 043348
Georgia Resource Center
101 Marietta Street
Suite 3310
Atlanta, Georgia 30303
404/614-2014
FAX 404/614-4656

By: M. Elizabeth Wells

Exhibit "A"

No. 95-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

In re Ellis WAYNE FELKER

MOTION FOR LEAVE TO PROCEED IN FORMA PAUPERIS

Petitioner, ELLIS WAYNE FELKER, by and through his undersigned counsel, asks leave to file the attached Petition for Writ of Habeas Corpus, For Appellate or Certiorari Review of the Decision of the United States Circuit Court For the Eleventh Circuit, and For Stay Of Execution, and to proceed in forma pauperis, pursuant to Rule 39 of the Rules of this Court.

Petitioner's Affidavit in support of this motion is attached hereto as "Exhibit A."

Respectfully Submitted,

STEPHEN C. BAYLISS
Georgia Bar # 043348
M. ELIZABETH WELLS
Georgia Bar # 747852
Georgia Resource Center
101 Marietta Tower, Suite 3310
Atlanta, Georgia 30303
(404) 614-2014

No. 95-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

In re Ellis WAYNE FELKER

AFFIDAVIT OF POVERTY

I, ELLIS WAYNE FELKER, declare that I am the Petitioner in the above-entitled case; that in support of my motion to proceed without being required to prepay fees, costs, or give security therefor, I state that because of my poverty I am unable to pay the costs of said proceedings or to give security therefor, and that I believe that I am entitled to relief.

1. Are you employed? Yes ____ No ✓

   a. If the answer is "yes," state the amount of your salary or wages per month, and give the name and address of your employer. _____

   b. If the answer is "no," state the date of last employment, and the amount of salary and wages per month which you received. self-employed thru Dec. 1981 - no salary of any kind. Merely took money from business as needed

2. Have you received within the last twelve months any money from the following sources?

a. Business, profession or form of self-employment? Yes___ No✓
b. Rent payments, interest, or dividends? Yes___ No✓
c. Pensions, annuities, or life insurance payments? Yes___ No✓
d. Gifts or inheritances? Yes___ No✓
e. Any other sources? Yes___ No✓

If the answer to any of the above is "yes," describe each source of income and state the amount received from each during the past twelve months. _____

3. Do you own any cash, or do you have any money in any checking or savings account?

Yes ✓ No ___ (Include any funds in prison account)
If the answer is "Yes," state the total value of the items owned. _____

4. Do you own any real estate, stocks, bonds, notes, automobiles, or other valuable property (excluding ordinary household furnishings and clothings)?

Yes ___ No ✓

If the answer is "Yes," describe the property and state its approximate value. _____

5. List the persons who are dependent upon you for support, state your relationship to those persons, and indicate how much you contribute to their support. N/A

I understand that a false statement or answer to any question in this Affidavit will subject me to penalties for perjury.

Ellis Wayne Felker
ELLIS WAYNE FELKER

Sworn to and subscribed before me,
this the 24th day of April, 1996.

Notary Public
My Commission expires:

Notary Public, Clayton County, Georgia
My Commission Expires Jan. 17, 1998.

CERTIFICATE

I hereby certify that Petitioner, ELLIS WAYNE FELKER, EP-155370, has the sum of $117.64 on account to his credit at the Georgia Diagnostic and Classification Center where he is confined. I further certify that Petitioner likewise has the following securities to his credit according to the records of said Georgia Diagnostic and Classification Center.

None to my knowledge

Authorized Officer of Institution

No. 95-

IN THE SUPREME COURT OF THE UNITED STATES

October Term, 1995

ELLIS WAYNE FELKER,

Petitioner,

-v-

TONY TURPIN, Warden,
Georgia Diagnostic and
Classification Center,

Respondent.

CERTIFICATE OF SERVICE

I hereby certify that I have served a copy of the foregoing Motion For Leave To Proceed In Forma Pauperis upon Respondent by hand, addressed as follows:

Susan V. Boleyn, Esq.
Assistant Attorney General
132 State Judicial Building
40 Capitol Square, S.W.
Atlanta, Georgia 30334

This the 2D day of May, 1996.

ATTORNEY FOR PETITIONER

TOTAL P.08

[PUBLISH]

IN THE UNITED STATES COURT OF APPEALS

FOR THE ELEVENTH CIRCUIT

FILED
U.S. COURT OF APPEALS
ELEVENTH CIRCUIT
MAY - 2 1996
MIGUEL J. CORTEZ
CLERK

No. 96-1077

ELLIS WAYNE FELKER,

Petitioner,

versus

TONY TURPIN, Warden,
Georgia Diagnostic and
Classification Center,

Respondent.

On Application for Leave to File
Successive Habeas Corpus Petition

Before BIRCH, BLACK and CARNES, Circuit Judges.

B Y T H E C O U R T:

In Felker v. Thomas, 52 F.3d 907 (11th Cir.), extended on denial of rehearing, 62 F.3d 342 (1995), cert. denied, 116 S. Ct. 956 (1996), we affirmed the denial of habeas corpus relief as to the murder, rape, aggravated sodomy, and false imprisonment convictions, as well as the death sentence of Ellis Wayne Felker. The procedural history, evidence, and facts in the case are summarized in our prior opinions and in the Georgia Supreme Court's decision affirming his convictions and sentence on direct appeal,

Felker v. State, 252 Ga. 351, 314 S.E.2d 621, cert. denied, 469 U.S. 873, 105 S. Ct. 229 (1984).

On February 20, 1996, the Supreme Court denied Felker's petition for writ of certiorari seeking review of our decision denying his first federal habeas corpus petition. On April 17, 1996, the Superior Court of Houston County, Georgia, set May 2 through May 9, 1996, as the period during which Felker's execution would be carried out. On April 29, 1996, Felker filed a petition for writ of habeas corpus in the Superior Court of Butts County, Georgia. (It was his second state habeas petition; his first had been denied in 1990.) The Superior Court denied Felker's second state habeas petition on May 1, 1996, and the Georgia Supreme Court denied his petition for writ of certiorari at 11:00 a.m. ET, today.

Felker is now back before us. Yesterday afternoon, he lodged with this Court a request for a stay of execution and an application, pursuant to § 106 of the newly enacted Antiterrorism and Effective Death Penalty Act of 1996 ("the Act"), for permission to file a second federal habeas petition in the district court. He lodged a corrected application at 9:35 a.m. ET, this morning, and his application was formally filed at 11:30 a.m. ET, today.

Only last month, the Supreme Court emphasized the nonautomatic nature of stays of execution in second or successive habeas petition cases. Vacating the entry of a stay order by the Eighth Circuit in Bowersox v. Williams, 116 S. Ct. 1312 (1996), the Court reiterated that: "A stay of execution pending disposition of a second or successive federal habeas petition should be granted only

when there are substantial grounds upon which relief might be granted." Id. (citation and internal quotation marks omitted). The Supreme Court reminded us, in no uncertain terms, that: "[e]ntry of a stay on a second or third habeas petition is a drastic measure, and we have held that it is '"particularly egregious"' to enter a stay absent substantial grounds for relief." Id. (quoting Delo v. Blair, 509 U.S. 823, 113 S. Ct. 2922 (1993)).

Neither party in the present case contends that the standard applicable to stays of execution in second or successive petition cases has been changed by the Act.[1] Accordingly, we proceed to determine whether Felker has shown substantial grounds upon which relief might be granted, thus entitling him to the "drastic measure" of a stay of execution in this second petition case.

Felker requests that we enter a stay of execution "to allow full briefing on the many life or death issues created by the Act," which he contends violates the Fourth, Fifth, Sixth, Eighth, and Fourteenth Amendments, the Supremacy Clause, and the Separation of Powers doctrine. Alternatively, he requests a stay "because the Applicant has satisfied the provisions of the Act and is entitled to a remand." (footnote omitted). We address the second alternative first.

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[1]Nothing that we say about the Act in this opinion concerns § 107, which applies special habeas corpus procedures to capital cases arising in those states that qualify under the provisions of the newly enacted 28 U.S.C. § 2261. There is no contention, yet, that the State of Georgia has shown — or even had an opportunity to show — that it qualifies to benefit from the special procedures established by § 107 of the Act. Whether it does is a question for another day.

I. FELKER'S CONTENTION THAT HE HAS SATISFIED THE PROVISIONS OF THE ACT AND IS ENTITLED TO A REMAND

Section 106 of the Act amends 28 U.S.C. § 2244(b) to read, in pertinent part:

> (b)(1) A claim presented in a second or successive habeas corpus application under section 2254 that was presented in a prior application shall be dismissed.
>
> (2) A claim presented in a second or successive habeas corpus application under section 2254 that was not presented in a prior application shall be dismissed unless--
>
> > (A) the applicant shows that the claim relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable; or
> >
> > (B)(i) the factual predicate for the claim could not have been discovered previously through the exercise of due diligence; and
> >
> > (ii) the facts underlying the claim, if proven and viewed in light of the evidence as a whole, would be sufficient to establish by clear and convincing evidence that, but for constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense.
>
> (3)(A) Before a second or successive application permitted by this section is filed in the district court, the applicant shall move in the appropriate court of appeals for an order authorizing the district court to consider the application.
>
> (B) A motion in the court of appeals for an order authorizing the district court to consider a second or successive application shall be determined by a three-judge panel of the court of appeals.
>
> (C) The court of appeals may authorize the filing of a second or successive application only if it determines that the application makes a prima facie showing that the application satisfies the requirements of this subsection.

Felker's application seeks an order from this Court authorizing the district court to consider a second or successive petition containing two claims. The first is a Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328 (1990), claim. Felker does not, and could not, contend that this is a claim the factual predicate of which "could not have been discovered previously through the exercise of diligence," within the meaning of new § 2244(b)(2)(B), because the factual predicate of the claim has been available on the record since Felker's trial.

As for § 2244(b)(2)(A), we have held that the Cage rule is retroactively applicable to cases that had completed direct review before the Cage decision was announced. Nutter v. White, 39 F.3d 1154 (11th Cir. 1994). However, we cannot find that Felker's Cage claim was "previously unavailable" to him when he filed his first habeas petition in 1993, which was long after Cage was decided. Felker argues in his application that the Cage claim was not available to him until Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078 (1993), made it obvious that the Cage rule was retroactive. Even assuming for present purposes the dubious legal premise that Cage was not available to Felker until the Sullivan decision was announced, the fact remains that Sullivan was decided on June 1, 1993, and Felker's first habeas petition was not formally accepted and placed on the docket until June 2, 1993.[2]

[2]Felker attempted to file his first habeas petition on April 27, 1981, but he did not pay the filing fee, and the magistrate judge denied his motion to proceed in forma pauperis. Not until Felker paid the filing fee on June 2, 1981, was the petition placed

And, of course, nothing would have prevented Felker from filing a motion to amend his first petition, even if the Sullivan decision had been released days or weeks after, instead of just before, the petition was filed. No answer was filed to the petition until August 6, 1993, and amendments to habeas petitions are freely permitted.

The other claim Felker seeks to litigate in a second or successive petition is a claim that "it violates the Eighth and Fourteenth Amendments for a non-physician, state agent to provide sole evidence upon which a jury relied to determine the critical issue of time of death." As we explain on pp. 17 - 19, below, this claim has no basis in the record, which contradicts it. However, even assuming for present purposes that there was some factual basis for the claim, it is not one which "relies on a new rule of constitutional law, made retroactive to cases on collateral review by the Supreme Court, that was previously unavailable" as required by newly amended § 2244(b)(2)(A). Not only is there no new decision announcing a rule of law that has been made retroactively applicable, Felker does not cite any decisional law whatsoever in support of his proposition.

As for § 2244(b)(2)(B), Felker does not contend that the factual predicate for this claim could not have been discovered previously through the exercise of due diligence. The factual predicate, to the extent any exists, is apparent on the face of the

---

on the civil docket. On June 9, 1981, the district court judge entered an order granting Felker's motion to proceed in forma pauperis and for appointed counsel.

trial record. The qualifications or lack of qualifications of Medical Examiner Warren Tillman were brought out on direct and cross-examination at the trial. There is no contention that Tillman did not testify truthfully concerning his background and qualifications. Moreover, as we explain on pp. 17 - 19, below, the facts underlying this claim if proven and viewed in light of the evidence as a whole, would not be sufficient to establish by a preponderance of the evidence, much less by clear and convincing evidence, that but for the alleged constitutional error, no reasonable factfinder would have found the applicant guilty of the underlying offense. Accordingly, under the new Act, Felker is not entitled to an order from this Court authorizing him to file a second or successive petition raising this claim.

II. FELKER'S CONTENTION THAT THE ACT IS UNCONSTITUTIONAL

Felker also contends that the Act violates his rights under the Fourth, Fifth, Sixth, Eighth and Fourteenth Amendments, as well as the Supremacy Clause and the Separation of Powers doctrine. His application provides very little discussion and cites no authorities for that proposition. However, given the time constraints facing us, we choose to analyze this claim not in the abstract, but instead in terms of whether the Act makes any difference insofar as a second or successive petition raising the claims Felker wants to litigate is concerned. Cf. Specter Motor Company v. McLaughlin, 323 U.S. 101, 105, 65 S. Ct. 152, 154 (1944) ("If there is one doctrine more deeply rooted than any other in the

process of constitutional adjudication, it is that we ought not to pass on questions of constitutionality ... unless such adjudication is unavoidable."); South Florida Free Beaches, Inc. v. City of Miami, Florida, 734 F.2d 608, 612 (11th Cir. 1984) (declining to address whether a statute was unconstitutional, because "[a]ny resolution of this issue would not affect the outcome of the case"). If Felker is barred from litigating the claims he presents under pre-existing law, then the Act's restrictions can have no unconstitutional effect on him. Cf. United States v. Missio, 597 F.2d 60, 61 (5th Cir. 1979) (affirming a denial of 28 U.S.C. § 2255 relief and holding that the district court correctly declined to address an issue involving the constitutionality of prior convictions where the same sentence would have been imposed even if those convictions had not been included in the presentencing report). Stated somewhat differently, if under pre-existing law Felker's claims do not present substantial grounds upon which relief might be granted, then his claim that the Act unconstitutionally restricts his presentation of such claims does not present substantial grounds for relief, either.

Under the pre-Act law concerning second or successive petitions, Felker would not be able to litigate the merits of the claims he presents unless he was able to establish cause and prejudice sufficient to excuse his failure to present those claims in his first petition, or failing that, unless the constitutional claims he attempts to litigate fall within the "narrow class of cases ... implicating a fundamental miscarriage of justice."

Schlup v. Delo, 115 S. Ct. 851, 861 (1995) (quoting McCleskey v. Zant, 499 U.S. 467, 494, 111 S. Ct. 1454, 1470 (1991)) (alteration in original). As it applies to claims relating to the guilt stage of a capital case, the fundamental miscarriage of justice exception to the cause and prejudice rule "requires the habeas petitioner to show that 'a constitutional violation has probably resulted in the conviction of one who is actually innocent.'" Id. at 867 (quoting Murray v. Carrier, 477 U.S. 478, 496, 106 S. Ct. 2639, 2649-50 (1986)). The petitioner must show that absent the constitutional violation "it is more likely than not that no reasonable juror would have convicted him in light of the new evidence." Id. That is a stronger showing than is required to establish prejudice, and will be found only in a "truly 'extraordinary'" case. Id.

We proceed to examine each of Felker's claims under that pre-Act second or successive petition law.

A. The Cage Claim

Felker cannot establish, and has not proffered, any valid cause for his failure to raise the Cage v. Louisiana, 498 U.S. 39, 111 S. Ct. 328 (1990), claim when he filed his first petition. Cage was announced years before Felker filed his first petition, and Sullivan v. Louisiana, 508 U.S. 275, 113 S. Ct. 2078 (1993), was announced just before the petition was formally filed and certainly well within the time for amending it. See pp. 5 - 6, above. Nor has Felker established the fundamental miscarriage of justice exception to the cause and prejudice requirement. He has not established that it is more likely than not that no reasonable juror would have convicted him but for the reasonable doubt jury instructions that were given in this case. Accordingly, pre-Act second or successive petition doctrine bars the Cage claim. It is not necessary to our application of pre-Act second or successive petition law to decide whether the claim also lacks merit. However, in the interest of completeness we also note that the claim, which can be decided based upon the trial record, does lack merit.

Felker argues that the trial court's reasonable doubt instruction violated his due process rights because the instruction allowed the jury to convict him based on less than a standard of utmost certainty.[3, 4] Felker contends that by equating proof

[3]The trial court's instruction is affixed to this opinion as Appendix A.

beyond a reasonable doubt with proof "to a moral certainty" the jury was allowed to convict based on less proof than that required to convict beyond a reasonable doubt.

In Cage, the Supreme Court held that a jury instruction that:

> equated a reasonable doubt with a "grave uncertainty" and an "actual substantial doubt," and stated that what was required was a "moral certainty" that the defendant was guilty ... suggest[ed] a higher degree of doubt than is required for acquittal under the reasonable-doubt standard. When those statements are then considered with the reference to "moral certainty," rather than evidentiary certainty, it becomes clear that a reasonable juror could have interpreted the instruction to allow a finding of guilt based on a degree of proof below that required by the Due Process Clause.

498 U.S. at 41, 111 S. Ct. at 329-30. The Supreme Court clarified its holding in Cage in Victor v. Nebraska and its companion case, Sandoval v. California. __ U.S. __, 114 S. Ct. 1239 (1994). There the Court held that although no particular words are required to define reasonable doubt, the trial court must correctly explain the standard in articulating the prosecution's burden of proof. Id. at __, 114 S. Ct. at 1243.

We described our method of review of a reasonable doubt charge in Harvell v. Nagle, 58 F.3d 1541 (11th Cir. 1995), petition for cert. filed, ___ U.S.L.W. ____ (Jan. 17, 1996) (No. 95-8450):

[4]We note that Felker does not challenge the "two inferences" language in the jury charge, i.e., that portion of the charge in which the court stated that, "if the circumstances in the case are subject to equally reasonable constructions, one indicating guilt and the other innocence, you are obligated under the law to accept that construction indicating innocence." (R. 1105). We do not, therefore, address this possible contention.

> When reviewing reasonable-doubt charges, we consider the instruction as a whole to determine if the instruction misleads the jury as to the government's burden of proof. See United States v. Veltmann, 6 F.3d 1483, 1492 (11th Cir. 1993). The Supreme Court has phrased the proper constitutional inquiry as "whether there is reasonable likelihood that the jury understood the instructions to allow conviction based on proof insufficient to meet the Winship standard." Victor, __ U.S. at __, 114 S. Ct. at 1243.

Id. at 1542. In Harvell, the petitioner argued that the instruction given equated reasonable doubt with "actual and substantial doubt" and "moral certainty." Id. We held that when viewed in the context of the remainder of the jury charge, the trial court's references to "actual and substantial doubt" and "moral certainly" were eradicated and "did not create a reasonable likelihood that the jury understood the instruction to allow conviction based on proof insufficient to meet the Winship standard." Id. at 1545.

In Cage, the Supreme Court addressed three phrases that it deemed to have tainted the charge: "grave uncertainty," "actual substantial doubt," and "moral certainty." 498 U.S. at 41, 111 S. Ct. at 329. In Harvell, we addressed two potentially problematic phrases. Harvell, 58 F.3d at 1543. Here, Felker can only point to one phrase, used twice in the jury charge, that he argues constitutes a constitutional defect, i.e., the use of the term "moral certainty."

The Harvell charge made the following references to "moral certainty":

> Let's don't forget the central issue that we are here about: Are you convinced--and I will talk about the measure of proof in just a moment, beyond a reasonable doubt and to a moral certainty that the State has proven Roy Avon Harvell intentionally, that is purposely, shot and killed Mr. Midgett or shot him for the purpose of killing him.
>
> * * * *
>
> So, the State, again, has to prove guilt beyond a reasonable doubt or to a moral certainty in order to overcome the presumption of innocence.
>
> * * * *
>
> The State is not required to convince you of Mr. Harvell's guilty beyond a reasonable doubt and to the point that you could not possibly be mistaken, but simply beyond all reasonable doubt and to a moral certainty.

Id. at 1545, 1546.

The jury charge in Felker's case made the following references to "moral certainty":

> In a criminal case, however, the state must prove each of its contentions beyond a reasonable doubt and to a moral certainty.
>
> The law does not require the defendant to prove that he is innocent. His innocence is conclusively presumed until the contrary is established by the evidence beyond a reasonable doubt. The state, however, is not required to prove his guilt beyond all doubt. Moral and reasonable certainty is all that can be expected in a legal investigation.

App. A at 1102 (emphasis added). In Felker's case, as in Harvell, any potential constitutional harm caused by these references to "moral certainty" were eradicated by the language in the rest of the charge, which grounded the definition of reasonable doubt in the evidence. Harvell, 58 F.3d at 1543-44; see also Victor, ___ U.S. at __, 114 S. Ct. at 1248.

In Victor, the Court found that the trial court's reference in the charge to "an abiding conviction ... of the guilt of the accused" did "much to alleviate any concerns that the phrase moral certainty might be misunderstood in the abstract." Victor, ___ U.S. at __, 114 S. Ct. at 1249, 1250. In Harvell, the trial court instructed the jury that reasonable doubt had to be derived from the evidence and that reasonable doubt could not be "fanciful, vague, whimsical, capricious, conjectural or speculative." Harvell, 58 F.3d at 1543. Likewise, in this case, the trial court's definition of reasonable doubt as "doubt which is based on the evidence, a lack of evidence or a conflict in the evidence" and "doubt which is reasonably entertained as opposed to vague or fanciful or farfetched doubt," served to erase any taint created by the term "moral certainty" and to thus place it beyond the potential for constitutional harm. App. A at 1102. "The instruction thus explicitly told the jurors that their conclusion had to be based on the evidence in the case." Victor, ___ U.S. at __, 114 S. Ct. at 1248. "Accordingly, there is no reasonable likelihood that the jury would have understood moral certainty to be disassociated from the evidence in the case." Id. In sum, the combination of the defining phraseology set out above, together with the remainder of the charge, which included other explanations and qualifications of the term "reasonable doubt,"[5] "convinces us

[5]"If after you consider all the facts and circumstances in the case your minds are wavering, unsettled and unsatisfied, then that is the doubt of the law, and you should acquit the defendant." App. A at 1103. "No conviction should rest upon suspicion, conjecture or the possibility of guilt." Id. at 1105-06.

that it was not reasonably likely that the jury understood the instructions to allow conviction based upon proof insufficient to meet the Winship standard." Harvell, 58 F.3d at 1545 (emphasis added).

In addition to contending that the trial court's charge to the jury violated his due process right under Cage, Felker also argues that the prosecutor's remarks to individual jurors during voir dire regarding the state's burden of proof implicate the same concern as that addressed by the Supreme Court in Cage. Felker correctly points out that, during voir dire, the prosecutor explained to several jurors that "moral and reasonable certainty is all that is required in a legal investigation." See, e.g., (R. 215, 265, 314, 393, 587, 629).

The purpose of voir dire examination is to allow the government and the defendant to evaluate and select an impartial jury capable of fairly deciding the issues presented by applying the law as instructed by the court to the facts as produced during the trial. United States v. Miller, 758 F.2d 570, 571 (11th Cir.) (emphasis added), cert. denied, 474 U.S. 994, 106 S. Ct. 406, 88 L. Ed. 2d 357 (1985). (emphasis added). We note that, immediately following voir dire, the court explicitly instructed the impanelled jurors that "[a]rguments by counsel are not evidence, and you are not bound by them." (R. 4). In light of our conclusion that the

"[B]efore you would be authorized to convict on evidence which is entirely circumstantial, such evidence must not only prove the guilt of the accused beyond ever reasonable doubt, but it must also exclude every other reasonable theory except that of guilt." Id. at 1105.

trial court's jury charge, viewed in its entirety, appropriately instructed the jury with respect to its responsibility to find the defendant guilty beyond a reasonable doubt, and therefore did not violate Felker's due process right pursuant to Cage, we find that the prosecutor's remarks during voir dire to which Felker now objects were adequately rectified by the jury charge and the timely admonition to the jury discussed above, and did not taint the trial or the verdict.

Therefore, we conclude that even if Felker's claim under Cage was not barred under pre-Act second or successive petition law, he could not prevail on its merits because the trial court's references to "moral certainty," when viewed in context, as well as the admonition of the trial judge to the jury relative to the arguments of counsel, the entire charge, and the proximity of the charge to the jury's deliberation, did not create a reasonable likelihood that the jury was misled as to the proper burden of proof or encouraged to arrive at its verdict by applying a standard of proof lower than reasonable doubt.

B. Felker's Claim that Permitting a Non-Physician Medical Examiner to Testify to the Time of Death Violated Due Process and the Eighth Amendment

Felker offers no cause for his failure to raise in his first federal habeas petition the claim that it was constitutional error to permit Warren Tillman, a non-physician medical examiner, to give his opinion concerning the time of the victim's death. Medical Examiner Tillman's qualifications, or lack thereof, were fully developed during direct and cross-examination at trial. Accordingly, the claim that Felker belatedly seeks to raise concerning that matter has been fully available to him since the trial in 1983. Felker does not proffer any other cause for his failure to raise this claim in his first federal habeas proceeding in 1993.

Turning to the fundamental miscarriage of justice exception to the cause and prejudice requirement, Felker has not shown that it is more likely than not that no reasonable juror would have convicted him but for the alleged constitutional error of permitting Tillman to offer an opinion as to the time of death. Tillman testified that in his opinion the victim could have been killed as many as fourteen days prior to her body being discovered on December 8, 1981, which would mean that she could have been killed as early as November 24, 1981, the date she was last seen alive. Felker had an alibi from 7:00 p.m. November 25, 1981 forward. He contends that Tillman's testimony was critical to his conviction, because he argues, "[t]he only evidence that the death occurred when [Felker] could have caused it was the 'expert'

testimony of a non-physician [Tillman] employed by the prosecution arm of the State of Georgia." Application at 30-31. That simply is not true. Dr. James Q. Whitaker, a highly qualified pathologist and medical examiner (R. 428-30) also examined the pertinent evidence including photographs, the body itself after it was disinterred, tissue slides, and so forth, and he reached his own opinion concerning the time of death. The Georgia Supreme Court summarized Dr. Whitaker's testimony as follows:

> Dr. Whitaker, the medical examiner for Houston County, testified for the state in rebuttal. His early experience was in Baltimore, Maryland, and, perhaps due to the proximity of Chesapeake Bay, he had observed over "200 drowning or immersion-type cases." Dr. Whitaker testified that--considering the air temperatures in the relevant time period; the fact that most missing and murdered persons die soon after they disappear; the fact that when Joy Ludlam was found, she was wearing the same clothes as when she was last seen alive; and the extent of decomposition--in his opinion, death occurred two weeks prior to the discovery of the body.

Felker v. State, 252 Ga. at 359, 314 So.2d at 631. We have reviewed Dr. Whitaker's testimony at trial, and he did testify that: "I would say most — in my opinion, the time of death is shortly after she became missing, and in my opinion it's more likely, with a reasonable degree of medical probability, that the death occurred 14 days ago when she was missing, found missing, but certainly, with the degree of decomposition that is present, three to five days, within that time frame is possible, but I think that the time, in my opinion, is older than that." (R. 997-98).

There is no question that Dr. Whitaker is a qualified pathologist. He is a medical doctor, having pursued a study in the specialty of pathology, including an internship and residency in pathology, and he is a board certified anatomic and clinical pathologist. He had taught forensic pathology, and at the time of trial was the Chief Pathologist and Director of Laboratories and Clinical Pathology at the Houston County Hospital, in Warner Robbins, Georgia (R. 428). At the time of his trial testimony, Dr. Whitaker had performed over 1500 autopsies (R. 430).

Moreover, there was other evidence, in addition to Dr. Whitaker's expert opinion, that the victim's death occurred fourteen days before her body was discovered, making it likely that she was killed around November 24, 1981. It was undisputed that the victim's car was seen parked in an local bank parking lot on the evening of November 24, and the next morning her car was still parked there, apparently abandoned. There was also evidence that she had placed a call to her employer during the early evening of November 24, stating that she would not be working that evening. Felker admitted to an officer that the victim had made that telephone call from his home. When her body was discovered two weeks after she disappeared, it was clothed in the same dress she had been wearing when last seen on November 24. When that evidence is combined with other evidence of Felker's guilt, including the remarkable similarities between this crime and a similar crime he had committed and been convicted for earlier, see Felker v. Thomas, 52 F.3d at 908, we readily conclude that Felker has not shown that

but for the alleged constitutional violation of permitting Warren Tillman to offer his opinion as to the time of death, it is more likely than not that no reasonable juror would have convicted him.

Although pre-Act law certainly did not restrict the second and successive petition bar only to claims that lacked merit, we do note, for the sake of completeness, that this claim lacks merit. As we have pointed out previously, this claim is based upon the false premise that Warren Tillman was the only expert witness who testified to an opinion consistent with the victim having been killed at a time for which Felker did not have an alibi. But the record clearly shows that Dr. Whitaker, who was unquestionably qualified to give such an opinion, also testified to the same opinion as Tillman. In addition to the expert testimony, there was other evidence, which we have already discussed, establishing that the victim died as early as November 24, 1981. The standard of review for state evidentiary rulings in federal habeas corpus proceedings is a narrow one. Only when evidentiary errors "so infused the trial with unfairness as to deny due process of law" is habeas relief warranted. Lisenba v. California, 314 U.S. 219, 228, 62 S. Ct. 280, 286 (1941), quoted and applied in, Estelle v. McGuire, 502 U.S. 62, 75, 112 S. Ct. 475, 484 (1991); accord Baxter v. Thomas, 45 F.3d 1501, 1509 (11th Cir.) (evidentiary ruling claims reviewed only to determine whether the error "was of such magnitude as to deny fundamental fairness"), cert. denied, 116 S. Ct. 385 (1995); Kight v. Singletary, 50 F.3d 1539, 1546 (11th Cir. 1995), cert. denied, 116 S. Ct. 785 (1996). Such a determination

is to be made in light of the evidence as a whole. Viewing the evidence in this case in its entirety, the introduction of Warren Tillman's testimony did not so infuse the trial with unfairness as to deny Felker fundamental fairness and due process of law.

C. Actual Innocence as an Independent Constitutional Claim

Thus far we have discussed actual innocence only in the Schlup v. Delo "gateway" procedural, as distinguished from independent substantive, sense. See 115 S. Ct. at 860-61. Although not entirely clear, it appears from his application that Felker also may be seeking to either litigate actual innocence as a separate constitutional claim, or at least be seeking to challenge the Act as unconstitutional on the grounds that it precludes assertion of a separate and independent constitutional claim of actual innocence. More likely the latter. In regard to that possibility, the State has responded that the Act does not modify the law involving actual innocence claims. We need not decide whether the Act precludes such claims, because even if it did, that modification of the law would not affect Felker who does not have a valid actual innocence claim, anyway.

Justice O'Connor joined by Justice Kennedy, both of whose votes were necessary to the majority in Herrera v. Collins, 506 U.S. 390, 113 S. Ct. 853 (1993), explained that that decision left open the difficult question of whether federal habeas courts may entertain convincing claims of actual innocence. Id. at 472, 113 S. Ct. at 874. Justice O'Connor characterized the Herrera decision

as assuming "for the sake of argument that a truly persuasive demonstration of actual innocence would render any such execution unconstitutional and that federal habeas relief would be warranted if no state avenue were open to process the claim." Id. Making that same assumption, Felker is not entitled to habeas relief for two reasons. First, the Herrera opinion itself noted that, unlike Texas, Georgia is a state that not only permits motions for new trial on newly discovered evidence grounds, but it also provides that the time for filing such motions can be extended. Id. at 411 n.11, 113 S. Ct. at 866 n.11; Ga. Code Ann. §§ 5-5-40 and 5-5-41 (Michie 1995).[6] Therefore, this is not a case where there is "no state avenue ... open to process the claim." Id. at 472, 113 S. Ct. at 874.

Second, Felker has failed to persuasively demonstrate his actual innocence. Justice O'Connor's characterization of the habeas petitioner in Herrera is equally applicable to Felker:

> He was tried before a jury of his peers, with the full panoply of protections that our Constitution affords criminal defendants. At the conclusion of that trial, the jury found petitioner guilty beyond a reasonable doubt. Petitioner therefore does not appear before us as an innocent man on the verge of execution.

[6]At the time of Felker's conviction and sentencing in February 1983, Georgia law allowed defendants to move for a new trial on the basis of newly discovered evidence. See Dick v. State, 287 S.E.2d 11, 13 (1982). While Georgia law generally requires motions for a new trial to be made within 30 days of entry of judgment, see Ga. Code Ann. § 5-5-40 (Michie 1995), it also permits "extraordinary" motions to be filed after this deadline, see Ga. Code Ann. § 5-5-41 (Michie 1995). This was also true back in 1983 at the time of Felker's conviction and sentence in Houston County Superior Court. See Dick, 287 S.E.2d at 13 & n.2.

> He is instead a legally guilty one who, refusing to accept the jury's verdict, demands a hearing in which to have his culpability determined once again.

Id. at 419-20, 113 S. Ct. at 870. The only evidence Felker offers that was not offered at his trial are the affidavits of two medical examiners who criticize the qualifications of Medical Examiner Tillman and disagree with his opinion about the time of death. Neither of Felker's new experts impugn in any way the qualifications of Dr. James Whitaker, another medical examiner, who testified to the same opinion about the time of death as did Tillman. At most, the belated affidavits are cumulative evidence in support of Felker's position on the time of death issue. There was expert opinion testimony on both sides of that issue at trial, as well as other evidence. Considering it all, we do not doubt in the least Felker's guilt.

Moreover, permitting such last minute affidavits to reopen guilt issues, absent truly extraordinary circumstances which are not present here, would open up virtually any capital case in which expert testimony was presented on behalf of the State to relitigation on the eve of execution. We do not believe that the Constitution or anything in the Herrera decision requires that, particularly where, as here, we are convinced that, "[p]etitioner is not innocent, in any sense of the word." Id. at 419, 113 S. Ct. at 870 (concurring opinion of O'Connor, J., joined by Kennedy, J.).

III. CONCLUSION

Felker has failed to show substantial grounds upon which

relief might be granted under the new Act. Likewise, he has failed to show substantial grounds upon which relief might be granted insofar as any constitutional issues involving the Act are concerned, because he would not be entitled to any relief even under pre-Act law.

The request for a stay of execution is DENIED.

The application for an order authorizing the filing of a second or successive petition is DENIED.

THE STATE OF GEORGIA	)	Indictment No. 12405
vs.	)	Murder, Agg. Sodomy, Rape, et al
ELLIS WAYNE FELKER	)	CHARGE OF THE COURT

Members of the jury, on May 17, 1982, the grand jury of this circuit indicted the defendant, Ellis Wayne Felker, and charged him with the offenses of rape, aggravated sodomy, false imprisonment, robbery and murder.

To that indictment, and to those charges, Mr. Felker has entered his plea of not guilty, thereby denying and challenging each and every essential allegation in the indictment.

As I previously mentioned to you, the robbery charge is no longer before you because as a matter of law such charge was not proved, and the instructions which I will now give you will apply to each remaining charge in the indictment, unless I state otherwise.

Whether the other charges in the indictment have been proven is for you to decide based on the evidence on the instructions I will now give you.

The indictment, along with the defendant's plea of not guilty, will be out with you when you consider the case, and you may refer to them. They are not evidence, however, and you should not consider them as such. They simply represent the method by which the case was brought into court for trial.

In spite of his indictment, the defendant is presumed to be innocent until his guilt is established by the evidence to the exclusion of and beyond every reasonable doubt. The burden of proof in this case, as in all criminal cases, rests upon the state, from the beginning to the end of the trial, to establish beyond a reasonable doubt every fact essential to the conviction of the defendant. That is, the state must prove beyond a reasonable doubt that a crime was in fact committed and that the defendant was the person who committed the crime.

The standard of proof in a criminal case is higher than that required in a civil case. In civil cases, a simple preponderance or greater weight of the evidence is considered sufficient to sustain a contention. In a criminal case, however, the state must prove each of its contentions beyond a reasonable doubt and to a moral certainty.

The law does not require the defendant to prove that he is innocent. His innocence is conclusively presumed until the contrary is established by the evidence beyond a reasonable doubt. The state, however, is not required to prove his guilt beyond all doubt. Moral and reasonable certainty is all that can be expected in a legal investigation.

A reasonable doubt is defined as a doubt which is based on the evidence, a lack of evidence or a conflict in the evidence. It is a doubt which is reasonably entertained as opposed to a vague or fanciful or farfetched doubt.

If after you consider all the facts and circumstances in the case your minds are wavering, unsettled and unsatisfied, then that is the doubt of the law, and you should acquit the defendant. On the other hand, if such doubt does not exist in your minds as to his guilt, you should convict him.

One of the elements in every criminal case is the matter of venue; that is, the state must prove that the crime occurred in the county in which the case is being tried. For example, if a crime occurs in Houston County, then the trial for that crime shall be in Houston County.

In a murder case, the trial may be held in the county where the cause of death was inflicted or in the county where death actually occurred, if it cannot be determined where the cause of death occurred.

The defendant in this case contends that the state has not proved the element of venue. In that respect I instruct you that it is the state's burden, with respect to each charge in the indictment, to prove beyond a reasonable doubt that the crime might have been committed in Houston County. If the state fails to do this, then the defendant is entitled to a verdict of not guilty.

You are the sole judges of the credibility of the witnesses and of the weight to be given their testmiony. In deciding the credit to be given any witness' testimony, you may take into account his or her ability and opportunity to observe the facts; his or her memory; the witness' manner

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while testifying; any interest, bias or prejudice the witness may have, and you may also consider the reasonableness of such testimony.

If there are conflicts in the evidence, it is your duty under the law to reconcile them wherever possible so as to make all the witnesses speak the truth and not attribute a false statement to any of them. If you cannot do this, however, then you would believe that testimony which is most reasonable and credible to you.

A witness' testimony may be impeached or discredited by disproving the facts testified to by him or her, or by showing that the witness made a previous statement or statements inconsistent with or contradictory to the testimony given at trial.

If you determine that the testimony of any witness has been impeached or discredited in that manner, you are authorized to believe or disbelieve said witness' testimony in whole or in part.

If you find that any witness has been placed under hypnosis for the purpose of refreshing or improving that witness' recollection, and if you find that such testimony is in whole or in part induced by the hypnosis, then to the extent that it was you would disregard such testimony.

Ordinarily the court receives the testimony of witnesses only as to facts to which the witness has particular and direct knowledge. In certain cases, however, where a particular degree of skill or knowledge is required to understand the situation, the law receives the opinion of those deemed to be expert in certain lines. The opinion testimony of an expert can be based on hypothetical questions or based on the expert's observations. You should not consider any opinion at all unless the facts upon which it is based are found by you to be true.

Even though you are permitted to receive the testimony of an expert, you are not bound by such testimony. The law allows you to receive it and consider it, along with all the other evidence in the case.

Evidence is either direct or circumstantial. Direct evidence is that which itself speaks to the issue involved. Indirect or circumstantial evidence is that which by its consistency suggests or implies that a certain claim or theory is true.

Criminal conduct may be proved by circumstantial evidence as well as by direct evidence. However, before you would be authorized to convict on evidence which is entirely circumstantial, such evidence must not only prove the guilt of the accused beyond every reasonable doubt, but it must also exclude every other reasonable theory except that of guilt.

In other words, if the circumstances in the case are subject to equally reasonable constructions, one indicating guilt and the other innocence, you are obligated under the law to accept that construction indicating innocence.

No conviction should rest upon suspicion, conjecture

or the possibity of guilt.

A crime is defined as a violation of a statute of this state in which shall be a union of joint operation of act and intention. Criminal intent is a necessary element of a crime, and the state must prove such intent, just as it must prove every other essential element of the crime.

No person should be found guilty of any crime which is committed by misfortune or accident, where it satisfactorily appears there was no criminal intention.

No one is presumed to act with criminal intention, but you may find such upon a consideration of the words, conduct, demeanor, motive and all other circumstances connected with the offense. You may likewise find a lack of criminal intent upon such a consideration.

Every person is presumed to be of sound mind and discretion and is presumed to intend the natural and probable consequences of his acts. The acts of such a person are presumed to be intentional. These presumptions may be rebutted by any evidence to the contrary.

In this case, the state has contended that the defendant was involved in a similar offense in 1976, and evidence was offered concerning the 1976 occurrence. The court allowed that evidence solely for you to decide whether it might tend to illustrate the defendant's motive, intent or state of mind with respect to the charges for which is is now on trial, and for no other purpose.

Whether the defendant in fact committed such other

offense, and if so, whether it illustrates his state of mind in this case, is a matter for you to decide.

In order for any crime to have been committed upon the person of the victim in this case, you must find beyond a reasonable doubt that such crime, if any, was committed upon her before she died.

In count one of the indictment, the defendant is charged with the offense of rape. A person commits rape when he has carnal knowledge of a female forcibly and against her will. Carnal knowledge in rape occurs when there is any penetration, however slight, of the female sex organ by the male sex organ. For such carnal knowledge to constitute the offense of rape, the penetration must have been accomplished by force and against the will and without the consent of the female alleged to have been raped. The offense of rape is not complete if the element of force is lacking in the commission of the sexual act.

In count two of the indictment, the defendant is charged with the offense of aggravated sodomy. A person commits the offense of sodomy when he performs or submits to any sexual act involving the sex organs of one person and the anus of another. A person commits the offense of aggravated sodomy when he commits sodomy with force and against the will of the other person.

In this case, the state must prove beyond a reasonable doubt that the defendant inserted his sex organ into the anus of Evelyn Joy Ludlam with force and against her will

in order for there to be a conviction under this count.

In count three of the indictment, the defendant is accused of the offense of false imprisonment. A person commits the offense of false imprisonment when, in violation of the personal liberty of another, he detains such person without legal authority.

In count five of the indictment, the defendant is charged with the offense of murder. A person commits murder when he unlawfully and with malice aforethought, either express or implied, causes the death of another human being. Express malice is that deliberate intention to kill which is manifested or shown by external circumstances capable of proof.

Malice shall be implied where no considerable provocation appears and where all the circumstances of the killing show an abandoned and malignant heart. Malice is an essential element of murder, and it must exist before any homicide can be murder. Malice in its legal sense is not necessarily ill will or hatred. It is the unlawful, deliberate, preconceived intention to kill a human being without justification or excuse, which intention must exist at the time of the killing. If such intention enters the mind of the slayer a moment before he commits the fatal act, that is sufficient.

Members of the jury, you should take the instructions which I have given you in this case and apply them to the facts as you find the facts to be, and arrive at a verdict which speaks the truth. The object of every legal investigation is the discovery of the truth. You are not concerned with the effect or consequence of your verdict. You are only concerned that the speak the truth.

As to each count in the indictment, the four remaining counts, members of the jury, if you believe beyond a reasonable doubt that the defendant is guilty as charged in the indictment, it would be your duty to convict him, and the form of your verdict in that event would be, "We find the defendant guilty."

On the other hand, if you do not believe that the defendant has committed the offenses with which he's charged or any one of them dealing with each particular count, or if you entertain a reasonable doubt as to the defendant's guilt, it would be your duty to acquit him, and in that event the form of your verdict would be, "We find the defendant not guilty."

Whatever your verdict is, members of the jury, one of you as foreperson of the jury should write it out separately as to each count on the back of the indictment. You should then date it and sign it. Then you would notify the bailiff that you have arrived at your verdict, and you will be asked to come back into the courtroom so that your verdict can be published as provided by law.

I ask at this time, please, that the 12 of you on the regular jury panel retire to this jury room. I'm going to ask the two alternates for the time being to retire back ho

I believe, to my office. Any objection to that, for the time being? All right.

(The jury thereupon left the courtroom at 2:28 p.m.)

* * *

THE COURT: Does the state have any exceptions to the charge?

MR. FINLAYSON: No, sir, your Honor.

THE COURT: Do you at this time, Mr. Hasty or Mr. Brown?

MR. BROWN: Judge, the only thing that, other than failure to give our requests to charge, that I would make exception to is the judge charged, like a lot of courts do, that the jury must make the witnesses speak the truth; that coupled with the fact that the judge charged the jury that they have a duty to convict if they find that there's not reasonable doubt, I think the combination there would tell the jury they have to believe somebody that they may otherwise decide to disregard entirely, whether or not the person has been impeached.

I think one privilege the jury would have would be to simply disregard somebody's testimony without that person being impeached, and the judge's charge does not give them that option. I would point that out now, but, of course, we don't waive the various other requests. I don't have a list of all of the requests that were not given at this time I don't recall one on the wavering mind, if the jury

were to say that --

MR. HASTY: Yeah.

MR. BROWN: Was that given? We would reserve our right to any further objection.

THE COURT: I think you may reserve your exceptions. I don't think under the present law you are required to go into any detail as to any problems with the charge; and, as I said, now, we will get a copy of your requests, along with those of the state, marked filed.

Now, do you want to get together and get the evidence to go to the jury?

(The exhibits were thereupon gathered by counsel and the reporter.)

(The exhibits were taken to the jury at 2:43 p.m.)

Now, let me tell you what I have in mind doing with respect to the two alternates, is to continue sequestering them until such time as this jury reaches a verdict.

Now, my impression is that they can be called on to serve in connection with this case up until that time. Once this jury decides the verdict, I think their services are over, even if the jury convicts the defendant. I question whether they would be permitted to serve in an alternate capacity in the sentence phase not having participated in the guilt or innocence. I don't think they could.

MR. DANIEL: The law says the same jury shall consider the penalty as considered the first . . .